

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35183

JEREMY FLORES SANCHEZ,)	2009 Unpublished Opinion No. 558
)	
Petitioner-Appellant,)	Filed: August 5, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. James C. Morfitt, District Judge.

Judgment of the district court denying application for post-conviction relief, affirmed.

Elliott Law Firm, PLLC, Kathleen J. Elliott for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Jeremy Flores Sanchez appeals from the district court's denial of his application for post-conviction relief. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

Sanchez was found guilty upon jury verdict of conspiracy to commit robbery, Idaho Code §§ 18-1701, 18-6501; robbery, Idaho Code §§ 18-204, 18-6501, 18-6502, 18-6503; conspiracy to commit first degree kidnapping, Idaho Code §§ 18-1701, 18-4501; first degree kidnapping, Idaho Code §§ 18-204, 18-4501, 18-4502; aggravated battery, Idaho Code §§ 18-903(a), 18-907(b); and attempted first degree murder, Idaho Code §§ 18-204, 18-306, 18-4001, 18-4002, 18-4003. The district court sentenced Sanchez to four consecutive determinate life terms and two consecutive determinate fifteen-year terms. His convictions and sentences were affirmed by this Court on direct appeal. *State v. Sanchez* 142 Idaho 309, 324, 127 P.3d 212, 227 (Ct. App. 2005).

Sanchez filed a pro se application for post-conviction relief asserting claims of ineffective assistance of trial counsel, due process violations, ineffective assistance of counsel on appeal, conflict of interest of counsel on appeal, and miscarriage of justice, i.e., actual innocence and new evidence. The district court initially appointed the public defender and, thereafter, substitute counsel was assigned to represent Sanchez. Following a hearing on the State's motion for summary dismissal, the district court granted summary dismissal of all but one of Sanchez's claims. An evidentiary hearing was conducted and the district court dismissed the remaining claim of ineffective assistance of trial counsel regarding an alleged failure to investigate post-attack use of the victim's credit card. This appeal followed.

II.

ANALYSIS

Sanchez does not seek direct review of the district court's dismissal of his post-conviction relief claims on the merits. Instead, Sanchez seeks relief in this Court alleging a potential conflict of interest by substitute counsel. Further, Sanchez claims that his right to procedural due process, under the Fourteenth Amendment to the United States Constitution and Idaho Constitution Article I, Section 13, was not adequately protected because the district court failed to address the potential conflict of interest. Sanchez contends that his application for post-conviction relief should be remanded to the district court for a determination of whether Sanchez objects to substitute counsel's representation and whether there exists good cause for a second substitution of counsel. The State responds that Sanchez did not preserve this issue for appeal, failed to show any due process violation, and there is no evidence that substitute counsel had an actual conflict of interest.

At the initial status conference, substitute counsel represented to the district court that she had three potential conflicts of interest. First, she had worked as a deputy prosecutor at the time the case arose, and though she did not work on the case, she was aware of it. Second, she participated in the case of a co-defendant by researching and drafting a motion to dismiss based on prosecutorial misconduct. The same motion was used in Sanchez's case. Third, she assisted a co-defendant's trial counsel, though she did not appear in that case. She represented to the district court that she would consult with bar counsel and discuss her potential conflict with Sanchez.

The record contains no further references to the potential conflict of interest. There is no evidence in the record whether substitute counsel did or did not discuss the potential conflict of interest with bar counsel or Sanchez. There is also no evidence in the record whether substitute counsel, formally or informally, did or did not provide further information to the district court or opposing counsel regarding her potential conflict of interest. Subsequent to the initial status conference, she represented Sanchez at the summary dismissal hearing, a scheduling conference, and the evidentiary hearing where she presented evidence and argument. Neither substitute counsel nor Sanchez brought an appropriate motion to the district court for any decision regarding the potential conflict of interest issue. Generally, issues not raised below may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992).

Sanchez seems to imply that substitute counsel's potential conflict of interest was never disclosed to him and, therefore, he could not have timely raised the issue in the district court. However, the record does not indicate whether or when Sanchez knew of the potential conflict of interest. It is just as likely that substitute counsel and Sanchez determined that there was no actual conflict and determined not to pursue it as it is likely that substitute counsel articulated the potential issue to the district court and then failed to give it any further consideration. Although Sanchez would have this Court assume that he did not know of the potential conflict of interest in time to properly raise an objection in the district court, this Court cannot make such an assumption. The issue of substitute counsel's potential conflict of interest was not properly raised with the district court prior to the dismissal of Sanchez's application or by appropriate post-judgment motion. Therefore, it was not preserved for appeal and, in addition, there was no adverse ruling by the district court affecting Sanchez. Accordingly, this Court will not consider the issue, as it is raised for the first time on appeal.

Although Sanchez failed to preserve the issue of substitute counsel's potential conflict of interest with the district court, he asserts that due process imposed upon the district court an obligation to sua sponte conduct its own investigation as to whether there existed an actual conflict of interest. He argues that because the potential conflict of interest was brought to the district court's attention, the district court deprived him of his right to procedural due process when it did not take steps to inform Sanchez, inquire whether he waived the conflict, or otherwise determine the issue.

Although Sanchez relies on the Due Process Clauses of the United States and the Idaho Constitutions, the due process guarantees derived from the two constitutions are substantially the same. *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983). Where a defendant claims that his or her right to due process was violated, we defer to the trial court's findings of fact, if supported by substantial evidence. *State v. Smith*, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001). However, we freely review the application of constitutional principles to those facts found. *Id.* The test for determining whether state action violates procedural due process requires the court to consider three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest though the existing procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), *Rios-Lopez v. State* 144 Idaho 340, 342, 160 P.3d 1275, 1277 (Ct. App. 2007).

Sanchez contends that the private interest at stake was securing conflict-free counsel to adequately present his claims in the application. The right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. *State v. Cook*, 144 Idaho 784, 791, 171 P.3d 1282, 1289 (Ct. App. 2007). While the district court may order appointment of counsel and, for good cause, assign substitute counsel, in a post-conviction relief action applicants do not have a constitutional right to counsel. *Freeman v. State*, 131 Idaho 722, 724, 963 P.2d 1159, 1161 (1998); *Follinus v. State*, 127 Idaho 897, 902, 908 P.2d 590, 595 (Ct. App. 1995). Consequently, Sanchez's reliance on *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980), which is a Sixth Amendment right to counsel case, is misplaced. Therefore, while Sanchez may have had an interest in securing conflict-free counsel to present his claims, his interest does not rise to the level of the constitutional right to counsel. *See Rios-Lopez*, 144 Idaho at 342, 160 P.3d at 1277.

We next consider the risk of an erroneous deprivation of Sanchez's asserted interest through the existing procedures used and the probable value, if any, of additional or substitute procedural safeguards. The existing procedures required that Sanchez bring a supported motion to the district court for determination of any conflict of interest and/or request substitute counsel. This is the procedure all litigants must follow. Sanchez did not do so. The district court here

provided a forum for Sanchez to properly raise and obtain determination of the issue. The district court engaged substitute counsel in a discussion regarding the potential conflict of interest and, at substitute counsel's request, allowed additional time for evaluation and presentation of the issue to the court if warranted. Substitute counsel fully described her initial concerns and presented a plan of action to the district court, which the court accepted. Additional procedure would have been of little value, as the court provided both a reasonable time to evaluate the issue and full access to the court for determination of the issue if necessary. Procedural due process requires an opportunity to be heard, *Rios-Lopez*, 144 Idaho at 343, 160 P.3d at 1278, which was provided by the district court.

Finally, Sanchez contends that, as an additional procedure, the district court should have sua sponte conducted its own investigation as to whether there existed an actual conflict of interest and the status of any waiver. Sanchez argues that, by virtue of the mere possibility of a conflict of interest being raised, due process places the burden on the district court to ensure final resolution of the issue. Regardless of the quantity or quality of information expressly or impliedly available to the district court of a possible conflict of interest, the court would become the guarantor that no un-waived conflict of interest existed. The burden of this additional procedure would be great and is unwarranted. Sanchez has cited to no authority holding that a trial court in a post-conviction relief action has such an obligation or any obligation beyond providing a forum for resolution of any such issues properly brought before it. Sanchez was not deprived of his right to procedural due process by the district court's failure to sua sponte provide notice, conduct its own investigation, and resolve the potential conflict of interest.

III.

CONCLUSION

Sanchez did not preserve the issue of his substitute counsel's potential conflict of interest, and therefore, it will not be considered on appeal. Sanchez's right to procedural due process was not violated by the district court not sua sponte providing notice, conducting its own investigation, and resolving the potential conflict of interest. The district court's dismissal of Sanchez's application for post-conviction relief is affirmed.

Chief Judge LANSING and Judge PERRY, **CONCUR.**